

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

K&SD ENTERPRISES, INC., *et al.*,

Plaintiffs,

v.

SHELL OIL PRODUCTS U.S., *et al.*,

Defendants.

Case No. C05-1972L

ORDER DENYING MOTION
FOR TEMPORARY
RESTRAINING ORDER

This matter comes before the Court on a motion for a temporary restraining order filed by plaintiffs K&SD Enterprises, Inc. d/b/a Puget Park Shell, Harjinder Singh, Jasvir Singh Dhillon and his wife Rupinder Kaur (collectively, “plaintiffs”). Plaintiffs, who have not given defendants notice of the motion, seek to temporarily restrain defendants from terminating the Lease and Agreement between plaintiffs and defendant Shell Oil Products U.S. (“Shell”) on November 30, 2005.

A. Background Facts.

Plaintiff K&SD Enterprises Inc. d/b/a Puget Park Shell (“K&SD”) does business as a Shell station in Everett, Washington. The individual plaintiffs are stockholders of K&SD. Plaintiff Dhillon is the president of K&SD, and plaintiff Singh is the Vice

1 President. K&SD purchased the Shell station in August 1998; it financed the purchase by
2 borrowing \$465,600.00 from AT&T Small Business Lending Corporation through the
3 United States Small Business Administration's Guaranteed Loan Program.

4 In January 2004, K&SD entered into a Retail Sales Agreement (the "Agreement")
5 and a Retail Facility Lease (the "Lease") with Shell. By certified letter dated August 23,
6 2005, Shell notified plaintiffs in writing that the Agreement and Lease would be
7 terminated effective November 30, 2005. In the letter, Shell stated that it was terminating
8 the Agreement and Lease because Puget Park Shell had been out of one or more grades of
9 motor fuel for twelve or more hours on 10 individual days over the course of the period
10 from April 25, 2005 to August 11, 2005, which constituted a "failure to operate the
11 marketing Premises for seven consecutive days, or any lesser period that, under the facts
12 and circumstances, constitutes an unreasonable period of time." Declaration of Jasvir
13 Dhillon, Ex. L. The letter also stated that plaintiffs failed to comply with lease provisions
14 which required plaintiffs to maintain sufficient amounts of all grades of fuel and to devote
15 reasonable efforts to preserve the value of the station. Shell stated that these
16 circumstances justified its termination of the Agreement and Lease.

17 Plaintiffs argue that the stated reasons for termination, under the facts and
18 circumstances, do not meet the criteria for termination of the Lease and Agreement set
19 forth in the Agreement. Plaintiffs argue that defendants breached the contract by
20 terminating the Agreement and Lease in bad faith and without cause. They argue that
21 "the times and amounts of Plaintiffs' running out of different 'flavors' of fuel over the
22 past several years does not constitute Plaintiffs'" breach of the contract. Complaint at p.
23 8. Plaintiffs contend that Shell's "acts and omissions with regard to providing fuel to
24 Plaintiffs is a material reason for each of the fuel shortages now complained of by
25

1 Defendants Shell and [its agent] Equilon.” Id. at p. 8.

2 **B. Analysis.**

3 The standard for issuing a temporary restraining order is the same as the standard
4 for issuing a preliminary injunction. Thus, to qualify for a restraining order, the moving
5 party must show either (1) a combination of probable success on the merits and the
6 possibility of irreparable harm, or (2) that serious questions are raised and the balance of
7 hardships tips sharply in the moving party's favor. See, e.g., Dumas v. Gommerman, 865
8 F.2d 1093, 1095 (9th Cir. 1989). These standards are not treated as two distinct tests, but
9 rather as “the opposite ends of a single continuum in which the required showing of harm
10 varies inversely with the required showing of meritoriousness.” Rodeo Collection, Ltd. v.
11 West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987) (internal quotation and citation
12 omitted).

13 Plaintiffs concede that they have not given notice of the motion to defendants.

14 Plaintiffs’ counsel states that on November 21, 2005, he

15 spoke to two employees of Defendant Shell, and advise[d] one, Mr. Lambert, that
16 Plaintiffs would be going to court to attempt to prevent Defendants from taking
17 over their service station on November 30, 2005. I was given the name of an
18 attorney in Houston, Texas, who is allegedly corporate counsel for Shell, but was
19 also advised to send any correspondence relating to this matter through Mr.
20 Lambert, who operates out of California.

21 Motion for TRO at pp. 2-3. Plaintiffs’ counsel does not identify Mr. Lambert’s or the
22 other employee’s position or scope of authority. Plaintiffs do not explain why their
23 counsel did not contact Shell’s corporate counsel or serve notice of the motion on its
24 registered agent. Instead, plaintiffs’ counsel states that he *plans* to contact Shell’s
25 corporate counsel and serve Shell’s registered agent on November 23, 2005. However,
26 plaintiffs have not filed proof of service or updated the Court as to what, if any, efforts

1 they have made to provide notice. These facts fall far short of providing a sufficient
2 explanation of why plaintiffs have not provided defendants with notice of this motion.

3 Regarding the merits of plaintiffs' claims, plaintiffs do not dispute that they were
4 unable to provide all brands of Shell gasoline on ten individual days or that failure to
5 operate the marketing premises for an unreasonable period of time is grounds for
6 termination under the agreements and the Petroleum Marketing Practices Act. 15 U.S.C.
7 § 2801 *et seq.* (setting forth permissible grounds for termination and non-renewal of
8 gasoline franchises). Rather, plaintiffs argue that their failure was reasonable under the
9 circumstances because Shell's financial practices, including requiring K&SD to pay cash
10 on delivery for fuel, caused the shortages. Although plaintiffs argue that the contracts do
11 not require them to pay cash on delivery, plaintiffs have not identified any contract
12 provision that prevents defendants from instituting that requirement. Accordingly,
13 plaintiffs have not shown probable success on the merits or serious questions regarding
14 the merits at this point in the litigation.

15 The Court also considers the potential harm to the parties and the public. The
16 Court cannot evaluate the harm to defendants because they have not had an opportunity
17 to respond to the motion. Plaintiffs do not allege that the public's interest is implicated
18 by their claims. Plaintiffs argue that if Shell terminates the Lease and Agreement,
19 "Plaintiffs Dhillon and Kaur will remain completely liable for the loan of over
20 \$465,000.00 that they received to purchase the business in 1998, with Unconditional
21 Guarantees to the SBA, which will cause a grave financial hardship upon them for the
22 rest of their lives;¹ additionally, Plaintiff Harjinder Singh will lose his entire investment in

24 ¹ Mr. Dhillon's declaration does not provide any additional details regarding the
25 injuries they will allegedly suffer. For example, it does not explain what the

1 the business.” Complaint at p. 7. However, courts have explained that “economic injury
2 alone does not support a finding of irreparable harm, because such injury can be remedied
3 by a damage award.” Rent-A-Center, Inc. v. Canyon Television & Appliance Rental,
4 Inc., 944 F.2d 597, 603 (9th Cir. 1991). Here, plaintiffs have not alleged any non-
5 economic harm, and the Court finds that the economic harm alone cannot support a
6 finding of irreparable harm. Instead, plaintiffs can recover their alleged economic losses
7 through a damage award if they succeed on the merits.

8 Furthermore, plaintiffs state that defendants notified them on or around August 23,
9 2005 of their intention to terminate the lease on November 30, 2005. Plaintiffs, however,
10 have provided no explanation of why they chose to wait three months to file this motion.
11 In light of this timing, it appears that any emergency is of plaintiffs’ own making.

12 Having considered plaintiffs’ motion for a temporary restraining order and
13 supporting documents, the Court finds that plaintiffs have not shown that they will suffer
14 immediate and irreparable injury absent a TRO or that their motion should be granted
15 without notice to defendants. Accordingly, the Court DENIES plaintiffs’ motion for a
16 temporary restraining order (Dkt. #2).

17
18 DATED this 29th day of November, 2005.

19
20 

21 Robert S. Lasnik
22 United States District Judge
23

24 “unconditional guarantee” entails or what, if any, personal assets plaintiffs pledged as
25 collateral.